

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT BURGOS	:	
Petitioner,	:	
	:	Crim. No. 3:94CR112 (AHN)
v.	:	Civ. No. 3:00CV934 (AHN)
	:	
UNITED STATES OF AMERICA,	:	
Respondent.	:	

RULING ON PETITION FOR WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2255

Petitioner Robert Burgos seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2255 seeking to correct his sentence. Burgos pleaded guilty to assault in aid of racketeering, 18 U.S.C. § 1959(a)(3), and to use of a telephone to facilitate a drug transaction, 21 U.S.C. § 843(b). He was sentenced on November 28, 1995, to 288 months imprisonment and 36 months supervised release. He now challenges his sentence and claims ineffective assistance of counsel. As set forth below, his petition [Dkt. #1635.] is denied.

BACKGROUND

At his plea allocution, which occurred after several days of trial, Burgos admitted to being a member of the New Haven and Bridgeport chapters of the Latin Kings -- a street gang involved primarily in narcotics racketeering. He admitted to distributing between 50 and 150 kilograms of cocaine and cocaine base in those areas. Also, Burgos admitted to

conspiring to murder Ricky Reyes, a rival narcotics dealer, in a drive-by-shooting. Though Reyes was not killed, the incident resulted in the death of an innocent bystander, and in the injury of three others, including a fourteen-year-old girl named Patrice Moye. A more detailed account of those events is contained in United States v. Diaz, 176 F.3d 52, 73 (2d Cir. 1999).

DISCUSSION

Burgos's habeas petition is based on several grounds. First, Burgos argues that his sentence was miscalculated and that the court should reduce it from the 288 months imposed by the court, to 48 months. Second, Burgos claims that he was prejudiced by his counsel's ineffective assistance with various aspects of his trial and ultimate guilty plea. Finally, Burgos reasons that his good behavior and rehabilitation while in jail merits a post-conviction downward departure. The government contends that Burgos's sentence should stand, and that his other claims should be denied.

A. Correction of Sentence Under § 2255

Section 2255 provides, in pertinent part, that "[a] prisoner in custody under sentence of a court . . . may move the court which imposed the sentence to . . . correct the sentence." _Burgos contends that the sentence he received

under the United States Sentencing Guidelines ("Guidelines") was not calculated correctly. Specifically, Burgos claims that because the offense level for the drug conspiracy charge was controlling, he should not have been sentenced to more than 4 years -- the maximum statutory sentence for that offense. See 21 U.S.C. §843(b). Essentially, Burgos argues that the court should have entirely disregarded the statutory sentence for the assault charge. Burgos's argument fails, and therefore his sentence will not be corrected.

1. Multiple Counts of Conviction Under the Guidelines

Where there is more than one count of conviction, the Guidelines provide specific rules for determining a single "combined offense level" that encompasses all the counts. In principle, this prevents multiple punishment for substantially similar offenses. Thus, convictions on multiple counts do not result in a sentence that is enhanced by the other counts, unless the additional offenses involve different types of conduct. See U.S.S.G. §§ 3D1.1 - 3D1.5.

Counts are placed into distinct groups of closely related offenses, and the offense level for the highest group is used as the starting point. See id. at § 3D1.3. Additional punishment for other offenses is added incrementally. See id.

at § 3D1.4 (one unit for offenses that are equal or within 1 to 4 offense levels less serious than the highest level offense; one-half unit for each offense level that is 5 to 8 levels less serious than the highest level offense; no units for offenses that are 9 or more levels less serious than the highest level offense). The offense level is then increased based on the total units computed, yielding a "combined adjusted offense level." See id. at § 3D1.5. The combined adjusted offense level is then used in conjunction with the criminal history category to determine the guideline range from the sentencing table, the "total punishment."

The total punishment is implemented using § 5G1.2, which dictates whether the sentence should run concurrently or consecutively. If the highest statutory maximum for any of the counts is adequate to achieve the total punishment, then the sentences on all counts run concurrently. However, if the highest statutory maximum of all counts is less than the total punishment, then the sentence for one or more of the other counts is imposed consecutively, without exceeding the combined maximum sentence authorized by statute.

In this case, Burgos was convicted of two substantially unrelated charges -- assault in aid of racketeering and use of a telephone to facilitate a drug transaction (drug

conspiracy). The Guidelines provide for an adjusted offense level of 29 for the assault count, and a 44 for the drug conspiracy count. Of the two groups, the offense level for the drug conspiracy was higher. Thus, 44 was used as the base offense level. No incremental units were added because the adjusted offense level for the assault, i.e., 29, was more than 9 levels less than that for the drug conspiracy. A two-level reduction was made for Burgos's acceptance of responsibility, resulting in a combined adjusted offense level of 42. Burgos had a criminal history category of II, thus his sentencing range, or total punishment, was 360 months to life. Because the highest maximum statutory sentence for either counts (240 months) was less than the total punishment calculated under the Guidelines (360 months), the sentences for both counts were imposed consecutively, equaling 24 years -- which was equivalent to the combined statutory maximum allowed.

There is no merit to Burgos's contention that because the court used the drug conspiracy count to calculate the base offense level of 44, it should not have sentenced him to more than the statutory maximum for that offense -- 4 years. Essentially, he proposes that the court should have completely disregarded the 20-year sentence that the assault charge

carries. As a logical matter, a set of rules that constrains a court to the lesser of two sentences, in effect always forcing it to disregard the entirety of a defendant's convicted offenses, makes no sense. As a matter of application, the sentencing ranges under the Guidelines bear little relation to maximum sentences derived by statute. The latter serve simply as upper limits on what the sentencing court can impose for any one count. Thus, where there are multiple counts and the total punishment exceeds the combined maximum statutory sentence for all counts, as in this case, under the Guidelines, a court cannot impose more than the equivalent of the combined statutory maximum. That is, the Guidelines are restricted by the applicable maximums.

This does not mean, however, that sentencing is restricted to merely the maximum statutory sentence belonging to the offense used to calculate the base offense level. The offense levels under the Guidelines, and maximum statutory sentences, are not meant to directly correlate with each other. The Guidelines were designed to make federal sentences more consistent across the board, and, in doing so, take many variables into consideration. Statutory maximum sentences, on the other hand, simply dictate the most a defendant can be sentenced to if convicted of the underlying offense. Thus,

the two cannot be interchanged, as Burgos implies. See Introductory Comments, U.S.S.G. § 3D1.1.

Here, the statutes under which Burgos was convicted, for assault in aid of racketeering and drug conspiracy, 18 U.S.C.

§ 1959(a)(3) and 21 U.S.C. § 843(b), permit maximum sentences of 20 years and 4 years, respectively. While the Guidelines yielded a sentence of 360 months to life, after taking into account Burgos's criminal history and other aggravating factors, the court was limited to imposing the combined maximum statutory sentence of 24 years -- which is the sentence that Burgos received. While it is understandable that Burgos may be confused by how maximum statutory sentences interrelate with the total punishment under the Guidelines, his claim, nonetheless, has no merit, and therefore his sentence is not subject to correction.

B. Ineffective Assistance of Counsel

Under Strickland v. Washington, 466 U.S. 668, 687 (1984), a habeas petitioner claiming ineffective assistance of counsel must make a two-part showing. First, the petitioner must demonstrate that counsel's performance was deficient -- that errors were made of such serious magnitude that petitioner was deprived of the "counsel" guaranteed by the Sixth Amendment. Id. Second, the petitioner must show that there is a

reasonable probability that, but for counsel's deficient performance, the result would have been different. Id. at 694. In essence, petitioner must submit evidence showing that he was deprived of his constitutional right to a fair and reliable result. Id. at 687.

Here, Burgos claims ineffective assistance of counsel on several grounds. He states that counsel failed to: 1) inform the court of an alleged biased juror; 2) failed to challenge the stipulated drug amount; 3) allowed him to plead guilty to the assault in aid of racketeering charge despite counsel's supposed knowledge that there was insufficient evidence to support it. The court finds no merit in any of these claims.

1. The Allegedly Biased Juror

While Burgos ultimately entered into a plea agreement with the government, he did not do so until after several days of trial. Burgos claims that his plea was involuntary, and was prompted by information he received from another inmate -- that one of the jurors in his trial held a personal bias against all alleged Latin Kings. Burgos argues that his counsel did not properly bring this to the attention of the court, and that had counsel done so, he would not have pleaded

guilty. The government contends that, in pleading guilty, Burgos waived his right to object to the voluntariness of his plea. The court agrees.

In the context of an ineffective assistance claim, Burgos is limited to arguing that the advice he received from counsel to plead guilty was not within acceptable standards. As Strickland sets out, counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable, professional judgment. Id. at 690.

Here, the record shows that the government was prepared to offer ample evidence against Burgos. At about the same time that Burgos confronted counsel with the biased juror allegation, counsel was approached by the government with a plea offer. Burgos does not present any evidence that even intimates that counsel's advice to him to accept the offer was not based on anything other than informed and reasoned considerations. It is reasonable to infer that Burgos's counsel made a calculated effort to minimize his client's exposure to criminal liability, and that counsel would have given Burgos the same advice even if Burgos had not raised the biased juror allegation. Once presented with the government's plea offer, counsel could reasonably have concluded that

accepting the offer was better for his client than contesting the alleged bias of the juror. Clearly, the court cannot conclude, based on the great amount of deference afforded counsel, that counsel's advice here was below an acceptable standard of legal professionalism. Therefore, Burgos's ineffective assistance claim on this issue must be denied.

2. Counsel's Alleged Failure to Challenge the Stipulated Drug Amount

At sentencing, Burgos was attributed with having distributed between 50 and 150 kilograms of cocaine or cocaine base between November 1991 and October 1992. For purposes of arriving at a base offense level under the Guidelines, the breakdown between cocaine and cocaine base was calculated at 20 kilograms and 50 kilograms, respectively. Burgos claims that he did not become a Latin King until June 1992, and that based on that fact, counsel did not properly challenge the cocaine base drug amount. The government contends that Burgos's membership in the Latin Kings does not diminish his culpability for the drug amounts that he distributed. The court agrees.

Nonetheless, for the sake of argument, even if counsel did err in not objecting to the drug quantities, or did not object to them properly, no prejudice resulted to Burgos. If, as Burgos insists, only the 20 kilograms of cocaine had been

used to calculate his base offense level on the drug conspiracy count, the same sentence could still have been imposed. Under the Guidelines, distribution of at least 15 kilograms of cocaine -- an amount less than Burgos concedes to having distributed (20 kilograms) -- yields an offense level of 34. Applying the same enhancements for possession of a dangerous firearm (+2) and role in the offense (+4) -- which Burgos does not here contest -- his adjusted offense level would have been 40. Because the drug count would still have carried the highest offense level, 40 would have been used as the combined adjusted offense level. Deducting 2 levels for acceptance of responsibility would have yielded a 38 total combined offense level. Taken with Burgos's criminal history category of II, his sentencing range, or total punishment, would have been 262 to 327 months. The combined statutory maximum that the court imposed for the assault and drug conspiracy counts -- 288 months -- falls within that range. Thus, even if counsel had objected to the drug quantities, as Burgos suggests, and even if the court had considered and sustained the objection -- though in no way is that implied here -- the court could still have imposed the same sentence on Burgos. Thus, even if counsel erred in not objecting to the drug quantities, the error did not prejudice Burgos.

3. Counsel's Alleged Failure to Contest the Assault
in Aid of Racketeering Charge

Burgos does not deny that he conspired to kill Ricky Reyes, only that he never intended for Patrice Moye or anyone else to get injured in the process. He claims that counsel was ineffective in allowing him to plead guilty to the assault charge because there was insufficient evidence to support a conviction on that count. Nonetheless, he acknowledges that counsel made objections to the court along those lines -- that the shooting of Patrice Moye was outside the scope of the conspiracy and that therefore Burgos could not be held culpable.

For purposes of Burgos's ineffective assistance claim, it suffices to say that whether Patrice Moye's shooting was within the scope of the conspiracy or not was a contestable issue of law. The record shows that, after questioning counsel, the court was inclined to view the shooting as within the scope of the conspiracy. Having deduced this, counsel likely realized that taking the government's plea offer reduced Burgos's exposure to a longer sentence. Absent an agreement, Burgos could have also faced a murder in aid of racketeering charge for the death of another bystander that resulted from the shooting. As the government points out, some of Burgos's co-conspirators were charged and convicted of

that crime. While it may be true that Burgos would have found himself in a relatively better position had his counsel's argument to the court succeeded, under Strickland, it does not mean that counsel's failure to persuade the court on that issue rendered his assistance ineffective. See id. at 691. Thus, Burgos's claim on the assault charge must also be denied.

C. Burgos's Other Grounds for Relief

The court has carefully considered Burgos's additional grounds for relief -- that the cumulative effect of his counsel's errors deprived him of effective counsel and that his outstanding and continued post-conviction accomplishments and efforts merit a downward departure in his sentence -- and finds that they are also without merit. Because, as discussed above, the court finds that no single aspect of counsel's performance in this case was deficient, the court cannot therefore conclude that the cumulative effect of counsel's errors, as Burgos suggests, prejudiced him. Moreover, while Burgos's apparent post-conviction rehabilitation is truly a laudable achievement, it is not something for which relief can be granted here.

CONCLUSION

For the foregoing reasons, plaintiff's petition for a writ of habeas corpus [Dkt. #1635.] is DENIED.

So ordered this ____ day of October, 2003 at Bridgeport, Connecticut.

Alan H. Nevas
Senior United States District

Judge